(2)

Supreme Court, U.S.
FILED
NOV 15 1993
OFFICE OF THE CLERK

No. 93-470

In the Supreme Court of the United States

OCTOBER TERM, 1993

MYRON DEAN SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAYTON M. CRAMER
Colonel, U.S. Army

JAMES L. POHL
Major, U.S. Army

JOSEPH C. SWETNAM
Major, U.S. Army

JOHN G. GIOVANNELLI
Captain, U.S. Army
Appellate Government Counsel
Government Appellate Division
Falls Church, Virginia 22041-5013

BEST AVAILABLE COPY

17 pp

QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel at trial.

2. Whether the evidence is sufficient to sustain petitioner's indecent assault conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Hamling v. *United States*, 418 U.S. 87 (1974)	11
Hoffa v. *United States*, 385 U.S. 293 (1966)	12
Jackson v. *Virginia*, 443 U.S. 307 (1979)	12
Strickland v. *Washington*, 466 U.S. 668 (1984)	5
United States v. *Bailey*, 444 U.S. 394 (1980)	12

Statutes:

Uniform Code of Military Justice, 10 U.S.C. 901 *et seq.*:	
Art. 66, 10 U.S.C. 866	12
Art. 134, 10 U.S.C. 934	2

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-470

MYRON DEAN SANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1-8, is reported at 37 M.J. 116. The memorandum opinion of the Army Court of Military Review, Pet. App. 9-17, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 24, 1993. The petition for a writ of certiorari was filed on September 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Riley, Kansas. He was convicted of indecent assault in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. Petitioner was sentenced to dismissal from the service. The convening authority approved the findings and sentence.[1] The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals unanimously affirmed.

1. Petitioner, a captain in the United States Army, is trained and qualified as a nurse anesthetist. As a nurse anesthetist, petitioner was responsible for the sedation of patients during surgical operations. Pet. 3.

On May 12, 1989, 18-year-old M. underwent gallstone surgery at Irwin Army Community Hospital. Tr. 110-112. She met petitioner when she was being prepared for anesthesia. M. was subsequently moved to the operating room to be prepared for surgery. Petitioner was responsible for her sedation throughout the operation. He connected M.'s intravenous tube and talked with her until she was unconscious. Tr. 113.

After the operation, M. awoke in a semi-conscious state, lying on a gurney with a desk on her right side. Tr. 114, 132. Petitioner was on her right side

[1] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried by court-martial for the charged offenses and conducts a post-trial review of the proceedings.

adjacent to her legs. The recovery room was cold and petitioner was alone in the room with her. M. was covered with a gown and sheet from her neck halfway to the floor. Tr. 114-115. Specifically, she remembered that there were lights above her and that there was a desk to the right, which had upon it a telephone and papers. Tr. 115.

Petitioner, who was wearing scrubs, had his hand under M.'s bedsheet and between her thighs. According to the victim, petitioner began touching the outside of her vagina. Next, he began rubbing it and eventually inserted his fingers where he continued rubbing from top to bottom. Tr. 115-116. As petitioner rubbed her vagina, he asked her, "How does that feel?" and "Do you like that?" Tr. 117. She closed her eyes. When she reopened them, petitioner was on her left "doing the same thing." Tr. 116. Again, M. closed her eyes for a short time and, when she opened them, petitioner was sitting at the desk having a telephone conversation. She remembered petitioner stating that he had "[M.] up in [the] recovery [room]." Tr. 117. M. drifted off, and when she awoke a third time, petitioner was rubbing her vagina all over and asking, "How does that feel?" and "Do you like that?" *Ibid.* As petitioner rubbed M.'s vagina, she noticed that his hand "was real cold." Tr. 118. M. tried to resist, but was too weak to do so. She testified that

> the second time that he was on my right side I tried to shut my right leg some but not very much because—I guess because of the drugs that I just kind of felt real heavy and it was hard to move my leg but I moved it in some, and he touched the

> inside of my thigh and pushed it back out and I didn't move again.

Ibid.

On the day she left the hospital, M. told her mother about petitioner's conduct. Tr. 120-121.[2] M. was concerned that if she failed to report him, petitioner would assault other patients. Tr. 121.

At trial, petitioner was represented by one civilian attorney and two detailed military attorneys. Tr. 2. He presented a so-called "good soldier" defense. He also presented evidence that the victim was suffering from hallucinatory side effects caused by the various drugs and anesthesia that she was given before, during, and after surgery. Pet. App. 10 n.2.

2. The Army Court of Military Review addressed both questions raised in the certiorari petition. After considering the entire record, that court affirmed the findings and sentence. Pet. App. 9-12.

3. The Court of Military Appeals affirmed. Pet. App. 1-8. It concluded that petitioner's trial counsel provided him adequate representation and that the evidence, if credited, was sufficient to support petitioner's conviction. *Ibid.*

ARGUMENT

1. Petitioner argues that his three civilian and military lawyers denied him the effective assistance

[2] M. did not report the molestation while she was in the hospital because she did not want to relive the experience. Tr. 120-121. She believed that "if I didn't talk to anybody I wouldn't ever think about it again and it would just go away." Tr. 121. The memory of the molestation, however, haunted her. Finally, she reported to her mother that petitioner had "touched her some place that he shouldn't have." Tr. 152-153.

of counsel because they failed properly to investigate his case, to prepare his witnesses, and to focus his defense. Petitioner maintains that his counsel failed to focus his defense on a theory relying on the hallucinatory side effects of nitrous oxide gas. That theory, he contends, could have allowed the panel to find that the victim was not assaulted, but in fact was suffering from nitrous-oxide-induced sexual fantasies. Pet. 6-7; Pet. App. 10 n.2. The courts below correctly rejected that claim.

a. In order to sustain a claim of ineffectiveness of counsel, petitioner must show both that his counsel supplied constitutionally inadequate representation and that he was prejudiced by his counsel's actions. *Strickland* v. *Washington*, 466 U.S. 668 (1984). The first prong requires proof that petitioner's lawyers made errors so serious that they did not function as the "counsel" guaranteed petitioner by the Sixth Amendment. *Id.* at 687. Petitioner also must show that counsel's deficient performance prejudiced his defense. *Ibid.* Petitioner must overcome a strong presumption that defense counsel supplied adequate representation. *Id.* at 690.

In this case, petitioner cannot carry his burden to show that his counsel provided inadequate representation and therefore cannot satisfy the first prong of *Strickland*. His contention rests on hindsight, and it fails in the context of the entire record.

Petitioner's three defense counsel put forth a more than competent effort on his behalf. They presented 15 witnesses covering 436 pages of a 784-page record and entered 21 exhibits. Tr. 168-604; DXs A-U. At trial, petitioner raised a so-called "good soldier" and "good nurse anesthetist" defense based on his nearly

perfect service record. Petitioner testified about the training and duties of a nurse anesthetist, as well as his version of the events concerning M.'s surgery and his actions with M. in the recovery room. Tr. 169-218.[3] Petitioner also called a number of witnesses who testified that he was an outstanding nurse. Tr.

[3] According to petitioner, he started to recover M. during surgery by first giving a neuromuscular blockade reversal to eliminate the effects of the induced paralysis necessary for surgery, and then stopped administering the nitrous oxide. Tr. 187. After completing several more steps in the procedure, petitioner placed M. on 100% oxygen. Tr. 188. He continued to monitor M. and, as he did so, he talked to her. Tr. 188-189. Because the intensive care unit was full, petitioner placed M. in the recovery room, where he was responsible for recovering the patient. Tr. 190. Petitioner physically touched M. to check her bladder, remove the blood pressure cuff, attach a sensor on her finger, and place a warm blanket on her. Tr. 196-198. He gave her fentanyl, a narcotic to ease discomfort, and droperidol to ease nausea. Tr. 204-207. Petitioner denied the victim's allegations. Tr. 218.

On cross-examination, petitioner admitted that M. was the only patient he had recovered alone at Fort Riley, and that M. accurately remembered that he was wearing a green scrub suit, did not have a mask on his face, and was not wearing gloves. Tr. 219-221. He also corroborated the victim's testimony that the recovery room was cold, that the sheets on her were folded in half, that her IV was on her left, that he was the only person in the recovery room, that she had one arm out of the sleeve of her gown, that petitioner was first on her right side and then on her left, and that there was a desk to her right in the room. Tr. 221-223. Petitioner also admitted that the victim testified accurately that he had talked on the phone, telling the person at the other end of the line that he had "[M.] down here in recovery." Tr. 223. Petitioner also admitted that nitrous oxide dissipates quickly. Tr. 225. Petitioner admitted that he failed to record M.'s vital signs after giving her the droperidol. Tr. 233.

272-328, 335-534. Those witnesses also said that, in their view, petitioner was well qualified to recover M. alone and that his conduct in her case, as he described it, was within professional norms.

Contrary to petitioner's suggestion, his counsel presented the theory of defense that M. was hallucinating because of the side effects of the various drugs used to sedate her for surgery. Several witnesses gave expert and individual impressions of the effect of anesthesia in support of such a defense theory. Pet. App. 2.

Major Barbara Jeleski, a recovery room nurse, testified that patients often have selective and inaccurate memories of what happened in the recovery room. Tr. 297. Colonel Mildred White testified that patients often suffer from misperception while under general anesthesia. Tr. 441. Colonel White then recounted a personal experience she had had while under general anesthesia, stating that she told stories and had a "weird feeling" in her vaginal area. Tr. 441-442. Major Dale Douglass testified that two drugs given to M. (fentanyl and droperidol) caused hallucinations in one of his patients. His patient saw "wild Arabian naked men * * * running up and down the ward area." Tr. 489. According to Major Douglass, such sexual fantasies occurred "occasionally." Tr. 490. Dr. Douglass also considered hallucinations a serious side effect of droperidol. Tr. 495.

Lieutenant Colonel Jill Keeler testified as an expert in the field of pharmacology. Colonel Keeler said that nitrous oxide can cause "postoperative dreams." Tr. 546. Colonel Keeler reviewed the cases of two patients who had such experiences:

> Well, I've talked to a couple of patients that had had dreams in conjunction with nitrous oxide, and what surprised me, only nitrous oxide, because again I considered it a relatively impotent drug and I don't expect its effects to be carried on over into the recovery area. But I've talked to two people who have had dental procedures done, and who have reported to me that after these dental procedures, where they received nitrous oxide, and nothing but nitrous oxide, and their local anesthetic, that they experienced bizarre dreams afterwards.

Tr. 546-547. According to Colonel Keeler, one of the individuals, a female, would have the same dream "that she was having sex." Tr. 547-548. Colonel Keeler later reiterated that nitrous oxide alone could cause hallucinations. Tr. 594. She then described another incident administered to nitrous oxide administered to "a young man."

> He was a little squeamish about the needle, so he went under 50 percent nitrous oxide prior to them putting in a nerve block for the actual anesthesia or analgesia procedure. And he had some very—a very real sensation of being stroked along the inner aspect of his thigh by the technician who was administering—the dental technician, female, who was administering the nitrous oxide.

Tr. 594-595. Colonel Keeler also testified concerning the effects of the other drugs given to M., and she specifically testified that M. could have suffered from "aberrations" and "bizarre dreams" as a result of the medications. Tr. 570-574. Colonel Keeler concluded that M. "has a harder time dealing with the dreams or

piecing it together because she's fighting something else, and being under the influence of drugs that she can't voluntarily shake off." Tr. 576-577. Colonel Keeler added that other drugs, such as diazepam and midazolam, could have been used to mask M.'s memory, if petitioner had determined to use them. Tr. 577-578.[4]

b. Despite the foregoing efforts by petitioner's three trial defense counsel, petitioner claims that his counsel were ineffective because they failed adequately to present a "nitrous oxide" defense.[5] As noted above, however, petitioner's lawyers presented evidence in support of such a defense through the testimony of defense expert Colonel Keeler. Tr. 546-

[4] In rebuttal, Dr. Frank Guerra testified that nitrous oxide, when used alone, can cause hallucinations or vivid dreams. Tr. 612. Dr. Guerra, however, stated that, in his opinion, nitrous oxide would not cause the same hallucinogenic effects when used in conjunction with other drugs. *Ibid.*

[5] Petitioner also claims that his defense counsel improperly relied on petitioner to provide a list of potential witnesses and to conduct research on the possible hallucinatory side effects of the drugs given to the victim before, during, and after surgery. Pet. 9-10. Petitioner agreed to undertake that task, however, because he had been relieved of his nursing duties. Pet. App. 75. Petitioner's own testimony also demonstrates that he was more than qualified to research any possible hallucinatory side effects of anesthetic drugs used during surgery. It also is common to ask the accused for a list of witnesses, and the record shows that the expert witnesses who testified on petitioner's behalf at trial were well prepared. See Tr. 488-489, 562-589. Petitioner also claims that his counsel were ineffective because they did not prepare witnesses far enough in advance of trial. Pet. 11. But it is reasonable for defense counsel to prepare witnesses close to the beginning of trial in order to keep their memories fresh.

547, 594-595. Petitioner concedes that that evidence was before the court-martial panel, but he criticizes his defense counsel nonetheless on three grounds. None of those complaints, however, has merit.

First, petitioner argues that his counsel should have called a local veterinarian, Dr. Lyons, as a witness to testify about his personal experience while he was under the effects of nitrous oxide at his office. He would have testified that he had a sexual dream about his female dental assistant. But petitioner's counsel could reasonably believe that Dr. Lyons' anecdotal testimony would not have been particularly helpful, especially because Colonel Keeler related a similar story of possible hallucinations during her testimony. Tr. 594-598. Declining to call Dr. Lyons as a witness therefore was a reasonable tactical judgment. See Pet. App. 78, 81-82. In a related vein, petitioner claims that defense counsel should have introduced the articles on nitrous oxide that he cites in the petition. Defense counsel explained that that judgment also was a tactical decision. Pet. App. 81. It also was a reasonable one, because competent counsel could reasonably have believed that the experts' live testimony was more easily understandable by the court-martial panel members and more forceful than written articles.

Lastly, petitioner criticizes his counsel for not offering evidence of M.'s then-recent out-of-wedlock pregnancy in order to discredit her testimony. That claim is meritless. The parties stipulated at trial that M. had given birth in March 1989. Petitioner's counsel used that stipulation during his examination of Colonel Keeler. When asked about the significance of the birth of M.'s child, Keeler responded that the

delivery was the victim's first hospitalization. She further said that being in the hospital for surgery shortly after giving birth might have caused M. to associate her previous experiences (having fingers inserted in her during delivery) with her perceived experience in this case. Tr. 596-597. Additional references to the pregnancy would have been cumulative, if not irrelevant.

Throughout petitioner's trial, his three defense counsel presented a cogent and well-reasoned defense. They presented evidence that petitioner was a respected nurse anesthetist, and they attacked the accuracy of the victim's perceptions through expert testimony. The Court of Military Appeals correctly described petitioner's trial representation as "sustained[,] determined, [and] professional" and the bulk of petitioner's challenges to his counsel as "mere Monday-morning quarterbacking." Pet. App. 5. Petitioner's claim lacks merit.

2. Petitioner argues that the evidence is insufficient to sustain his indecent assault conviction, because the only witness, the victim, was intermittently unconscious during the molestation. Pet. 25-26. Claims that the evidence is insufficient to support a conviction are best left to the courts of appeals to resolve and do not warrant review by this Court. See *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals"). In any event, the courts below correctly held that the evidence was

sufficient to sustain petitioner's indecent assault conviction.[6]

The test for determining whether evidence is sufficient to sustain a conviction is whether, viewing the evidence in the light most favorable to the government, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The issue in this case ultimately turns on the court-martial panel's judgment of the credibility of the victim and petitioner, and such credibility judgments are traditionally for the trier of fact to make. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 414-415 (1980) ("The Anglo-Saxon tradition of criminal justice * * * makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story."); *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."). In this case, M.'s detailed recollections and descriptions of petitioner's actions were corroborated in many respects by petitioner's testimony. M.'s testimony, if credited, is more than sufficient to sustain the judgment in this case.

---

[6] Petitioner's factual guilt of his offense has been determined not only by his court-martial, but also by the Army Court of Military Review exercising its factfinding powers under Article 66 of the UCMJ, 10 U.S.C. 866.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DAYTON M. CRAMER
Colonel, U.S. Army

JAMES L. POHL
Major, U.S. Army

JOSEPH C. SWETNAM
Major, U.S. Army

JOHN G. GIOVANNELLI
Captain, U.S. Army
Appellate Government Counsel
Government Appellate Division

NOVEMBER 1993